

# More News on Powers Reserved Exclusively to the States

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### Other Views:

- Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010), <https://repository.law.umich.edu/mlr/vol109/iss1/1/>.
- Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations But Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1 (1999), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=382562](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=382562).
- Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001), <https://scholarship.law.georgetown.edu/facpub/509/>.

This essay updates and supplements an article published last year in the *Federalist Society Review* entitled *The Founders Interpret the Constitution: The Division of Federal and State Powers*.<sup>1</sup> That article explained how during the Constitution's ratification debates (1787-90), leading Federalists (the Constitution's advocates) issued authoritative enumerations of powers that would remain outside the federal sphere under the Constitution if ratified. Most of the enumerators were highly respected American lawyers. The two most important non-lawyers were Tench Coxe and James Madison. Coxe was a Philadelphia businessman and economist, member of the 1789 Confederation Congress, and future assistant secretary of the treasury.<sup>2</sup> Coxe's ratification-era writings were highly influential among the general ratifying public—perhaps as influential as the essays in *The Federalist*.<sup>3</sup>

Subsequent interpreters of legal texts generally give considerable weight to representations of meaning presented by a measure's sponsors.<sup>4</sup> The Federalists enumerating powers the Constitution denied to the central government clearly intended that the ratifying public rely on their representations. These representations squarely contradict claims by some commentators that the Constitution conferred near-plenary authority on the federal government.

This essay serves two purposes. First, it briefly addresses and refutes claims that near-plenary federal power lurks within two seemingly straightforward constitutional grants: the Commerce

1 Robert G. Natelson, *The Founders Interpret the Constitution: The Division of Federal and State Powers*, 19 FED. SOC'Y REV. 60 (2018) [hereinafter *Natelson, Founders*]. That article built on and added to an earlier one: Robert G. Natelson, *The Enumerated Power of States*, 3 NEV. L.J. 469 (2003) [hereinafter *Natelson, Enumerated*].

2 For Coxe's life and career, see JACOB E. COOKE, *TENCH COXE AND THE EARLY REPUBLIC* (Univ. No. Car. Press 1978) [hereinafter *COOKE*]. An earlier biography, although inadequate for constitutional purposes, is HAROLD HUTCHESON, *TENCH COXE: A STUDY IN AMERICAN ECONOMIC DEVELOPMENT* (Johns Hopkins Press, 1938).

3 Professor Cooke observed that, "Although Coxe's essays were not in the same literary league [as *The Federalist*], they perhaps were contemporaneously more influential, precisely because they were less scholarly and thus easier for most readers to follow." COOKE, *supra* note 2, at 111.

4 In founding era interpretation, as today, representations of meaning by a measure's sponsors carried far more weight than allegations by opponents. Such representations bound the sponsors later. Relevant legal maxims were *Nemo contra factum suum venire potest* ("No one may benefit [literally, "come"] in violation of his own deed"), *Nemo potest mutare consilium suum in alterius injuriam* ("No one may change his plan [or "advice"] to the injury of another), and *Nullus commodum capere potest de injuria sua propria* ("No one may benefit from his own injury").

Maxims of construction enjoyed great deference during the founding era. 1 THOMAS WOOD, *AN INSTITUTE OF THE LAWS OF ENGLAND* 6 (10th ed. 1772) ("[Maxims] are of the same Strength as Acts of Parliament when once the Judges have determined what is a Maxim"). An early American court accepted this view in *State v.—* 2 N.C. 28, 1 Hayw. 29 (1794) ("And maxims being foundations of the common law, when they are once declared by the Judges, are held equal in point of authority and force to acts of Parliament").

Clause and the Necessary and Proper Clause. Second, it summarizes how materials reproduced in three newly published volumes in the *Documentary History of the Ratification of the Constitution of the United States* reinforce the conclusion of last year's article.<sup>5</sup>

## I. THE CONSTITUTION DID NOT GRANT NEAR-PLEINARY AUTHORITY TO THE FEDERAL GOVERNMENT

The Constitution is notable for its grants of power. A natural reading of those grants seems to offer little justification for many of the activities of the modern federal government. For example, it is hard to see how a power to impose taxes<sup>6</sup> includes authority to operate the Medicare program or shape the nation's system of public education. But apologists for an expanded federal role have long offered broad interpretations of the Constitution's grants to justify that role. Perhaps the first to do so was Alexander Hamilton, who in 1791 argued that the congressional power to tax to "provide for the general Welfare"<sup>7</sup> authorized spending of any kind Congress thought served the general welfare.<sup>8</sup> Notably, however, Hamilton refrained from offering this theory to the public until *after* the Constitution had been safely ratified; indeed, during the constitutional debates he argued to the contrary.<sup>9</sup>

The political environment during and after the New Deal encouraged expansive reinterpretations. Academics and judges defended the federal government's newly broadened scope and sought ways to support it constitutionally. During that period the Supreme Court adopted Hamilton's post-ratification reading of the General Welfare Clause.<sup>10</sup> Commentators also began to argue for a very expansive definition of the Constitution's phrase "to regulate Commerce."<sup>11</sup> Some contended the phrase encompassed not merely "commerce" in its strict sense (i.e., mercantile trade), but the entire national economy.<sup>12</sup> The New Deal Supreme Court

eventually adopted a variation of that view, although based more on the Necessary and Proper Clause than the Commerce Clause.<sup>13</sup>

More recent commentators have argued that the founding-era term "Commerce" was not limited to economic activities but referred to intercourse of all kinds, and that the clause therefore authorizes federal activity beyond what a natural reading would indicate. By this expanded reading, the Commerce Clause presumably authorizes Congress to regulate even what eighteenth century speakers sometimes called "commerce between the sexes." That contention has not been made directly, but it has been claimed that the Commerce Clause empowers Congress to regulate interstate externalities of all kinds.<sup>14</sup>

Still other commentators have attributed a very broad scope to the Necessary and Proper Clause.<sup>15</sup> For example, one writer argues that the provision in the clause reading "all other Powers vested by this Constitution in the Government of the United States" refers to a capacious and undefined inherent sovereign authority created by the Declaration of Independence and passed through the Continental and Confederation Congresses to the "Government of the United States."<sup>16</sup>

## II. EXPANSIONARY CLAIMS FOR THE COMMERCE AND NECESSARY AND PROPER CLAUSES ARE IMPLAUSIBLE

Readers familiar with the ratification record may notice a historical irony: The interpretative claims made by proponents of "big government" are eerily akin to those made by the Antifederalists, with their frenzied fears that the Constitution would result in a federal government out of control.<sup>17</sup> During

5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION OF THE UNITED STATES (John P. Kaminski et al. eds., 1976–2019) (multiple volumes) [hereinafter DOCUMENTARY HISTORY]. Most, but not all, of the DOCUMENTARY HISTORY recently has been placed on a free public access website. See <https://uwdc.library.wisc.edu/collections/history/constitution/>. Several volumes are yet to be published.

6 U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States . . .").

7 *Id.*

8 Alexander Hamilton, *Report on the Subject of Manufactures* (Dec. 5, 1791), <https://founders.archives.gov/documents/Hamilton/01-10-02-0001-0007> ("It is therefore of necessity left to the discretion of the National Legislature, to pronounce, upon the objects, which concern the general Welfare, and for which under that description, an appropriation of money is requisite and proper.").

9 Compare THE FEDERALIST NO. 17 (Alexander Hamilton) (arguing against an expansive interpretation of federal power).

10 *Helvering v. Davis*, 301 U.S. 619 (1937); *United States v. Butler*, 297 U.S. 1 (1936) (dicta).

11 U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.").

12 Professor Walter Hale Hamilton appears to have been the first to publicize this contention, doing so in a short book published in 1937. Professor William

Winslow Crosskey famously sought to document it. See Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 ST. JOHNS L. REV. 786, 791-93 (2006) [hereinafter *Natelson, Commerce*] (discussing these works). See Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1 (1999) (endorsing the Hamilton-Crosskey position).

13 *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941). *Wickard* is by far the more famous decision, probably because of its memorable facts, but the conclusion in *Wickard* was dictated by the conclusion in *Darby*. The Court renders its reliance on the Necessary and Proper Clause, as opposed to the Commerce Clause, more explicit in *Gonzales v. Raich*, 545 U.S. 1 (2005).

14 E.g. Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010).

15 U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

16 John Mikhail, *A Tale of Two Sweeping Clauses*, 42 HARVARD J. L. & PUB. POL'Y 29 (2018) [hereinafter *Mikhail, Sweeping*]; John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2014) [hereinafter *Mikhail, The Necessary and Proper Clauses*].

17 For example, Professor Mikhail's characterization of the Necessary and Proper Clause as a "sweeping clause," *Mikhail, Sweeping, supra* note 16, cribs from the Antifederalist playbook. E.g. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 150, 423, 436 *et passim* (Jonathan Elliot ed., 1866) [hereinafter *ELLIOT'S DEBATES*] (reporting this characterization by Patrick Henry).

Antifederalists called the Necessary and Proper Clause a sweeping clause to persuade the public that it granted powers beyond those enumerated, and that it therefore should not be ratified. However, it was not really a sweeping

the ratification debates, the Antifederalists' interpretations were refuted easily—at least as an intellectual matter—partly because they so often relied on obvious rhetorical abuses such as wrenching constitutional phrases out of context and inserting words absent from the text.<sup>18</sup> Moreover, educated readers could see that the interpretations Antifederalists offered bore little resemblance to how people actually wrote or read legal documents.

### A. Interpreting the Commerce Clause

Consider, for example, the constitutional terms “commerce” and “to regulate commerce.” The meaning of those terms to the founding generation has been examined in three comprehensive studies published since 2001, together relying on several thousand eighteenth century usages.<sup>19</sup> These studies found that, while broader meanings of “commerce” did exist, the word nearly always referred to mercantile trade and certain accepted incidents. They also show that “regulating commerce” was an established and discrete division of the law—like many other words and phrases defining the scope of the Constitution’s power grants: “Bankrupt[ly],”<sup>20</sup> “Naturalization,”<sup>21</sup> “establish Post Offices,”<sup>22</sup> “Offenses against the Law of Nations,”<sup>23</sup> and others.

Specifically, “to regulate commerce” meant primarily to set the rules for the body of law known as the *law merchant*. This was the jurisprudence governing mercantile trade and certain recognized incidents, such as commercial paper and marine

insurance.<sup>24</sup> In addition, the term “regulate commerce” included regulation of navigation and, to a lesser extent, other means of commercial carriage. However, the body of law labeled “regulation of commerce” certainly did not include governance over other activities affecting commerce or affected by commerce.<sup>25</sup> This is why the framers enumerated separately congressional powers over such subjects as bankruptcy<sup>26</sup> and intellectual property.<sup>27</sup>

### B. Interpreting the Necessary and Proper Clause

By an honest reading, the role of the Necessary and Proper Clause also was intended to be modest. Its wording was fairly typical of provisions in eighteenth century instruments granting enumerated powers. Provisions that were drafted as the Necessary and Proper Clause was drafted granted no authority at all; they were recitals explaining that the powers specifically listed carried incidental authority. This meant that a person granted enumerated powers could execute those powers by undertaking either (1) subordinate activities by which the enumerated powers customarily were executed or (2) subordinate activities without which execution of the enumerated powers would be very difficult.<sup>28</sup>

These historical facts have not prevented at least one commentator from claiming the clause was far more ambitious than that. He argues that the phrase “the Government of the United States” tells us the government enjoys extraconstitutional inherent sovereign authority.<sup>29</sup> During the Confederation Era, James Wilson claimed Congress enjoyed this kind of authority because he was frustrated with the strictly limited grants in the Articles of Confederation.<sup>30</sup> The commentator contends that such authority passed to the newly formed federal government.

Of course, the Constitution derived its legal force from the ratification, so we must ask whether the ratifiers accepted that view. For many reasons, the answer is “no.” Wilson’s theory of inherent sovereign authority was widely loathed. His earlier

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clause as founding-era law used the term. A sweeping clause (also called a “sweeping residuary clause”) conveyed items additional to those enumerated (although of the same general kind) to prevent accidental omission. *Moore v. McGrath* [K.B. 1774] 1 Cowp. 10, 12, 98 Eng. Rep. 939, 941 (Lord Mansfield); cf. *Strong v. Teatt* [K.B. 1760] 2 Burr. 910, 922, 97 Eng. Rep. 628, 634. By its wording (reinforced by Federalist representation), the Necessary and Proper Clause adds nothing to the powers the Constitution otherwise grants. *Infra* note 28 and accompanying text.

18 *E.g., Brutus V*, N.Y. J., Dec. 13, 1787, 14 DOCUMENTARY HISTORY, *supra* note 5, at 432, 433 (rewriting the General Welfare Clause to grant Congress “an authority to make all laws *which they shall judge necessary* . . . to promote the general welfare” and not mentioning that the General Welfare Clause pertained only to taxes); *Centinel V*, PHILA. INDEPENDENT GAZETTEER, Dec. 4, 1787, in 14 DOCUMENTARY HISTORY, *supra* note 5, at 343 (rewriting the Necessary and Proper Clause to authorize any law “Congress *may deem necessary and proper*”) (italics added).

19 *Natelson, Commerce, supra* note 12 (reporting every use of “commerce” in a range of contemporary legal dictionaries and treatises, and every appearance in every reported English or American case from 1501 through 1790, amounting together to approximately 473 uses); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) (reporting all uses at the Constitutional Convention, state ratifying conventions, and in other ratification materials); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003) (reporting 1,594 uses in the *Pennsylvania Gazette*, a leading contemporaneous newspaper). See also Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55 (2010).

20 U.S. CONST. art. I, § 8, cl. 4.

21 *Id.*, art. I, § 8, cl. 4.

22 *Id.*, art. I, § 8, cl. 7.

23 *Id.*, art. I, § 8, cl. 10.

24 *Natelson, Commerce, supra* note 12. There is no need to be deterred by Professor Balkin’s statement that “the trade theory [of commerce] remains ad hoc and formalistic.” Balkin, *supra* note 14, at 22. The interpretative methodology modern law professors deride as “formalism” simply refers to the methodology dominant before they invented “legal realism.” The Constitution is primarily a formalistic document, intended to be construed in a formalistic way.

25 *Natelson, Commerce, supra* note 12, at 843.

26 U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States”).

27 *Id.*, art. I, § 8, cl. 8 (“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

28 Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 52-83 (2010) (explaining the nature and meaning of provisions similar to the Necessary and Proper Clause in eighteenth century power-granting instruments).

29 *Mikhail, Sweeping, supra* note 16.

30 *Id.* ROBERT G. NATELSON, *THE ORIGINAL CONSTITUTION: WHAT IT ACTUALLY SAID AND MEANT* 246-47 (3d ed. 2015).

advocacy of it damaged his popularity and rendered him an object of suspicion during the ratification debates.<sup>31</sup> Accordingly, when those debates took place, Wilson and other Federalists took considerable pains to assure the ratifying public that the federal government would *not* have extensive implied authority.<sup>32</sup> As part of these reassurances Wilson,<sup>33</sup> like other Federalists,<sup>34</sup> specifically and repeatedly denied that the Necessary and Proper Clause conveyed additional powers. So thoroughly did Americans reject the theory of inherent sovereign authority that they adopted the Tenth Amendment partly from a (vain!) hope that the theory would never plague constitutional discourse again.<sup>35</sup>

Did, nevertheless, Wilson and a few nationalist allies accomplish their true object by adding the “Government of the United States” phrase to the Necessary and Proper Clause?<sup>36</sup> Again, no. Even if Wilson and a few other framers secretly had that goal, it would be irrelevant. We don’t construe a document according to a secret intent not disclosed to, or shared by, those who were parties to the document. What is determinative is not what Wilson privately thought or hoped, but what the ratifiers were told and understood.<sup>37</sup>

Even those few founders friendly to the general notion of inherent sovereign authority would not have found the concept in the Necessary and Proper Clause. As noted above, the claimed textual hook in the clause is the reference to powers vested in “the Government of the United States.” The argument is that (1) because the Constitution’s other provisions do not grant power

to the U.S. government as an entity, (2) to comply with the constructional preference against surplus, (3) we should assume the powers thereby referenced in the Necessary and Proper Clause derive from outside the Constitution.<sup>38</sup> However, the first premise is wrong. The Constitution *does* contain provisions granting powers to the government as an entity. There is no need to posit an extra-constitutional source.

Several clauses grant such power, although they do so with language of obligation rather than language of grant. If Jill’s boss tells her, “You must represent our company in negotiating the Smith contact,” imposition of this mandate—with words of obligation such as “must”—carries with it power to discharge it. Jill’s boss need not add, “I give you power to negotiate the Smith contract,” because the grant of power is implicit in the delivery of the mandate. This was true during the founding era as well.<sup>39</sup> For example, the Crown’s instructions to colonial governors—which, along with the accompanying commissions, were precursors of the Constitution’s Article II<sup>40</sup>—granted extensive powers to their recipients almost entirely through language of obligation.<sup>41</sup> Indeed, the “take Care” formula common in colonial instructions reappears in the Constitution,<sup>42</sup> where it grants the president authority to enforce the law even without reference to the Executive Vesting Clause.<sup>43</sup> Similarly, Article I requires each house of Congress to keep and publish a journal of its proceedings,<sup>44</sup> without any other language empowering each

31 Antifederalists dubbed Wilson, who was born and raised a Scot, “James de Caledonia,” and accused him of designs to create an all-powerful central government. *E.g.*, James De Caledonia to James Bowdoin, INDEPENDENT GAZETTEER, Mar. 4, 1788, reprinted in 34 DOCUMENTARY HISTORY, *supra* note 5, at 969.

32 *E.g.* James Wilson, *State House Yard Speech*, Oct. 6, 1787, <https://www.constitution.org/afp/jwilson0.htm>:

[T]he congressional power is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of the union. Hence, it is evident, that in the former case everything which is not reserved is given; but in the latter the reverse of the proposition prevails, and everything which is not given is reserved.

33 2 ELLIOT’S DEBATES, *supra* note 17, at 468 (James Wilson, speaking at the Pennsylvania ratifying convention) (“even the concluding clause, with which so much fault has been found, gives no more or other powers; nor does it, in any degree, go beyond the Particular enumeration”). *See also id.* at 448.

34 Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 84, 97-108 (2010) (collecting Federalist representations).

35 NATELSON, ORIGINAL CONSTITUTION, *supra* note 30, at 246-49. The theory was interred anew in *Kansas v. Colorado*, 206 U.S. 46 (1907), only to be roused again in *United States v. Curtiss-Wright*, 299 U.S. 304, 315-18 (1936) and perhaps in *United States v. Lara*, 541 U.S. 193, 201 (2004) (*dicta*).

36 Professor Mikhail lists instances in which he claims certain framers disguised an expansive meaning by clever omissions and other devices. *See Mikhail, The Necessary and Proper Clauses*, *supra* note 16, at 1130-31.

37 *See* Robert G. Natelson, *The Founders’ Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007) (discussing eighteenth century interpretive methods). *See also* NATELSON, *supra* note 30, at 28-31 (listing canons of construction).

38 Mikhail, *Sweeping*, *supra* note 16, at 40 (arguing that because the Constitution does not contain grants to “the Government of the United States,” “we must assume it refers to implied powers inherited from the Constitution’s congressional predecessors”). *See also* Mikhail, *Necessary and Proper*, *supra* note 16, at 1047.

39 Founding era drafters did not need to add separate power granting language to the language of obligation under at least three rules: (1) *Necessarium est quod non potest aliter se habere* (roughly, “If something in existence couldn’t exist without a thing, then that thing necessarily exists”), (2) *Cuicumque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit* (“To whomever a person grants something is also granted that without which the grant cannot exist”), and (3) *Frustra sit per plura, quod fieri potest per pauciora* (“It is useless to establish by more words what can be established by many fewer.”). On the importance of the rules of construction during the founding era, see NATELSON, *supra* note 30, at 28-31.

40 Robert G. Natelson, *The Original Meaning of the Constitution’s “Executive Vesting Clause”—Evidence from Eighteenth-Century Drafting Practice*, 31 WHITTIER L. REV. 1 (2009).

41 *See, e.g.*, Instructions to Gabriel Johnson, available at <https://i2i.org/wp-content/uploads/gabriel-johnston-instructions.pdf> (Aug. 2, 1733) (relying heavily on words of obligation as vehicles for empowerment of the royal governor of North Carolina); *cf.* Commission of Gabriel Johnson, available at <https://i2i.org/wp-content/uploads/gabriel-johnston-draft-commission.pdf> (May 10, 1733) (providing a more scanty list of powers). The form of the commissions was highly standardized. *See* ANTHONY STOKES, A VIEW OF THE CONSTITUTION OF THE BRITISH COLONIES 149-64 (1783). Both the commissions and the instructions were recognized as sources of authority. *Id.* at 183-84. *See also id.* at 199 & 202 (stating that the power to probate wills derives from a governor’s instructions).

42 U.S. CONST. art. II, § 3 (listing among other presidential powers and obligation the duty to “take Care that the Laws be faithfully executed”).

43 *Id.*, art. II, § 1.

44 *Id.*, art. I, § 5, cl. 5 (“Each House shall keep a Journal of its Proceedings, and from time to time publish the same”).

house to do so. The authority is encompassed in the duty. The Constitution contains other examples as well of power granted in the form of a mandate.<sup>45</sup>

Moreover, not all the Constitution's obligations are imposed merely on named officers and agencies. Article IV levies three obligations on "the United States." The obligations are to protect states from domestic violence, to protect them from invasions, and to guarantee them republican forms of government.<sup>46</sup> Article VI imposes yet another duty on "the United States": to pay Confederation debts.<sup>47</sup> These mandates necessarily convey the powers necessary to execute them.

What does the Constitution mean by "the United States"? Although the Constitution occasionally uses that phrase to refer to the country as a whole,<sup>48</sup> more commonly it means the U.S. government, including all its officers and instrumentalities. For example, the original Constitution mentions "the Treasury of the United States," meaning the U.S. government's treasury.<sup>49</sup> Similarly, it refers to an "Officer under the United States,"<sup>50</sup> meaning U.S. government officers as opposed to state officers, and to the "Coin of the United States."<sup>51</sup> The Seventh Amendment refers to "any Court of the United States,"<sup>52</sup> meaning a court that is an arm of the U.S. government, but not of a state government. The Tenth Amendment speaks of powers "not delegated to the United States,"<sup>53</sup> meaning to the government and its officers and instrumentalities. The meaning of "the United States" in Articles IV and VI also refers to the government and its officers and instrumentalities.

For the reasons outlined earlier, each of the obligations Articles IV and VI imposes on the U.S. government necessarily conveys to the government power to comply with that obligation. The premise behind the "implied sovereign authority" version of the Necessary and Proper Clause—that the Constitution does not convey powers to the government per se—is simply inaccurate. The efforts of modern commentators to find massive hidden reservoirs of federal authority lurking in the Constitution's straightforward grants are no more persuasive than similar efforts by their Antifederalist predecessors.

<sup>45</sup> *E.g., id.*, art. I, § 6, cl. 1 (requiring laws providing for compensation to members of Congress); art. II, § 3 (requiring the president to report to Congress on the state of the Union).

<sup>46</sup> *Id.*, art. IV, § 4.

<sup>47</sup> *Id.*, art. VI, § 1 requires the government to pay Confederation debts because they are "valid against the United States," even though not incurred under the Constitution's borrowing power, *id.*, art. I, § 8, cl. 2. (Technically, the latter provision is a grant of the power to exact revenue, not to pay.)

<sup>48</sup> *E.g., id.*, Preamb. ("People of the United States").

<sup>49</sup> *Id.*, art. I, § 6, cl. 1.

<sup>50</sup> *Id.*, art. I, § 6, cl. 2; *see also id.*, art. I, § 3, cl. 7 ("Office of honor, Trust or Profit under the United States," meaning an office of the U.S. government).

<sup>51</sup> *Id.*, § 8, cl. 6 ("Coin of the United States," meaning the U.S. government's coin).

<sup>52</sup> *Id.*, amend. VII.

<sup>53</sup> *Id.*, amend. X.

### III. FEDERALIST REPRESENTATIONS OF FEDERAL LIMITS

Theories of near-plenary federal power contradict numerous and repeated representations the Constitution's advocates made to the ratifying public during the constitutional debates. I summarized these representations in *The Founders Interpret the Constitution*.<sup>54</sup> These representations were not merely statements of expectation. They were specific representations to the ratifying public that the items enumerated were outside the federal purview. To my knowledge, modern advocates of federal omnipotence have never acknowledged the existence of those representations, much less attempted to account for them.

### IV. CONTRIBUTIONS FROM THE NEW VOLUMES OF THE DOCUMENTARY HISTORY

Earlier this year, the Wisconsin Historical Society published three new volumes of the *Documentary History of the Ratification of the Constitution*.<sup>55</sup> These volumes contain documents published in Pennsylvania during the ratification era but not included in the Pennsylvania volume of the *Documentary History* issued in 1976.

As a substantive matter, the three new volumes offer no surprises. As far as expansive claims for the Commerce and Necessary and Proper Clauses are concerned, the new volumes merely contribute more disproving evidence. For example, the term "commerce" appears many times, and the definable usages are consistent with, or reinforce, a scope limited to mercantile trade.<sup>56</sup> A newly reproduced founding-era discussion of the Necessary and Proper Clause adds to the available documentation affirming the provision's narrow purpose.<sup>57</sup>

<sup>54</sup> *Supra* note 1.

<sup>55</sup> DOCUMENTARY HISTORY, *supra* note 5.

<sup>56</sup> Robert G. Natelson, *New evidence on the "Power To . . . regulate . . . Commerce,"* available at <https://i2i.org/new-evidence-on-the-power-to-regulate-commerce/> (collecting examples). Among the many uses of "commerce" in these volumes, I have found only one where the meaning is arguably broader. In *Foreign Spectator*, PHILA. INDEPENDENT GAZETTEER, Sept. 12, 1787, in 32 DOCUMENTARY HISTORY, *supra* note 5, at 157, 159, the author quotes another's work in which "commerce" could be interpreted to include economic activities other than agriculture. This is not a necessary interpretation, however.

<sup>57</sup> *A Subscriber*, PHILA. INDEPENDENT GAZETTEER, October 19, 1787, reprinted in 32 DOCUMENTARY HISTORY at 422:

In the 8th section, the power of Congress is declared and defined in several particulars, but as it was impossible to make all the laws at one time, which might be necessary to provide for the modes of exercising those powers, there is a general clause introduced which is confined to the powers given expressly by this Constitution to the Congress. It is, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers, vested by this constitution in the government of the United States, or in any department or office thereof." This certainly is not so much power as every other legislative body on this continent has, for the powers of this Congress are confined to what is expressly delegated to them; and this clause for enforcing their powers is confined merely to such as are explicitly mentioned. Yet have the words been stretched and distorted by some writers so as to give a power of making laws in all cases whatever. Nothing betrays the base designs of a writer more than his perversion of a plain meaning, which he often does by laying hold of some words and dropping others so as to make the fairest conduct appear in a shape that itself abhors.

Probably the new volumes' most significant contribution is reprinting four essays by Tench Coxe, all signed "A Pennsylvanian."<sup>58</sup> Because the editors of the *Documentary History* excluded these essays from the initial Pennsylvania volume (reproducing them only on unindexed microfilm), they remained unavailable to most people. Perhaps the editors excluded them because they were published after the Pennsylvania ratifying convention concluded. Whatever the reason, their exclusion was a shame. Coxe's *Pennsylvanian* essays are among the most significant of all Federalist writings.

On December 18, 1787, nearly all the Pennsylvania ratifying convention delegates voting against the Constitution issued a public apology entitled *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania*.<sup>59</sup> The *Dissent* raised several arguments, but the core of its case—like the core of the Antifederalist case generally—was that the Constitution would enable the federal government to become too powerful. The *Dissent* cited the General Welfare and Necessary and Proper Clauses as potential avenues toward federal tyranny. It was extensively distributed, both in Pennsylvania and in other states.<sup>60</sup>

The month after the *Dissent's* publication, pro-Constitution correspondents wrote to Tench Coxe urging a public rebuttal.<sup>61</sup> Coxe responded with eight essays addressing the *Dissent*. The first was signed "Philanthropos," the next three "A Freeman," and the last four "A Pennsylvanian."<sup>62</sup> The four *Pennsylvanian* articles appeared in the *Pennsylvania Gazette* on successive weeks: February 6, 13, 20, and 27, 1788. They could not, of course, affect the result in Pennsylvania, but they were disseminated throughout the country, notably in states that had not yet ratified. One vehicle was the *Gazette* itself, perhaps the most respected newspaper in America and widely read outside Pennsylvania.<sup>63</sup> In addition, the Constitution's advocates distributed copies of the articles in other states; for example, Madison sent them throughout Virginia.<sup>64</sup> In anticipation of national circulation, Coxe had addressed his *Pennsylvanian* articles "To the People of the United States."

These contributions were of good quality. Coxe's leading biographer, Professor Jacob E. Cooke, described them as "Coxe's most noteworthy contribution to the ratification debate," adding that they "invite comparison to the best of the literature spawned by that controversy, including the *Federalist* essays . . ."<sup>65</sup> In his first two *Pennsylvanian* articles, Coxe pointed out that all the ratifying convention Antifederalists were strong supporters of

the controversial Pennsylvania state constitution. He contrasted this with the more bipartisan cast of the Federalists. He thereby sought to establish that Pennsylvania's Antifederalists were narrow partisans clinging to a defective state charter. In the fourth essay, he addressed some of the opponents' arguments about the structure of the new government.

For present purposes, the most important essay is the third. There, and to a certain extent in the fourth, Coxe rebutted the crux of the Antifederalist case: that the proposed Constitution granted the central government too much authority. Coxe itemized a great many functions the Constitution placed permanently outside the federal sphere. Of them he wrote, "The legislature of each state must possess, exclusively of Congress, many powers, which the latter can never exercise." In the fourth essay, he emphasized that the central government would have no control over religion. But the third contains his principal list of powers reserved to the states. These included operations a government must undertake by reason of being a government (such as creating and abolishing state offices and constructing "state houses, town halls, court houses"). They also included most traditional police powers. The third essay went on to say, in relevant part, that:

The state governments can prescribe the various punishments that shall be inflicted for disorders, riots, assaults, larcenies, bigamy, arson, burglaries, murders, state treason, and many other offences against their peace and dignity, which, being in no way subjected to the jurisdiction of the foederal legislature, would go unpunished. They alone can promote the improvement of the country by general roads, canals, bridges, clearing rivers, erecting ferries, building state houses, town halls, court houses, market houses, county gaols [jails—ed.], poor houses, places of worship, state and county schools and hospitals. They alone are the conservators of the reputation of their respective states in foreign countries, by having the entire regulation of inspecting exports. They can create new state offices, and abolish old ones; regulate descents of lands, and the distribution of the other property of persons dying intestate; provide for calling out the militia, for any purpose within the state; prescribe the qualifications of electors of the state, and even of the foederal representatives; make donations of lands; erect new state courts; incorporate societies for the purposes of religion, learning, policy or profit; erect counties, cities, towns and boroughs; divide an extensive territory into two governments; declare what offences shall be impeachable in the states, and the pains and penalties that shall be consequent on conviction; and elect the foederal senators. These things and many more can always be done by the state legislatures. How then can it be said, that they will be absorbed by the Congress, who can interfere in few or none of those matters, though they are absolutely necessary to the preservation of society and the existence of both the foederal and state governments.

In the executive department we may observe, the states alone can appoint the militia and civil officers, and commission the same. They alone can execute the state laws in civil or criminal matters, commence prosecutions,

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(Italics in original.)

58 33 DOCUMENTARY HISTORY, *supra* note 5, at 864, 890, 909 & 937.

59 15 DOCUMENTARY HISTORY, *supra* note 5, at 7, 13.

60 *Id.* at 7-13 (editor's note discussing the *Dissent's* history and distribution).

61 *Id.* at 12 (editor's note); COOKE, *supra* note 2 at 116.

62 COOKE, *supra* note 2 at 117; 15 DOCUMENTARY HISTORY, *supra* note 5, at 12 (editor's note).

63 The *Gazette* has been called the *New York Times* of its day. See <https://www.accessible-archives.com/collections/the-pennsylvania-gazette/>.

64 COOKE, *supra* note 2, at 119.

65 *Id.* at 118.

order out the militia on any commotion within the state, collect state taxes, duties and excises, grant patents, receive the rents and other revenues within the state, pay or receive money from Congress, grant pardons, issue writs, licences & c. [etc.—ed.]among their own citizens; or, in short, execute any other matter which we have seen the state legislature can order or enact. In the judicial department every matter or thing, civil or criminal, great or small, must be heard and determined by the state officers, provided the parties contending and the matter in question be within the jurisdiction of the state. Hence our petit and grand juries, justices of the peace and quorum, judges of the common pleas, our board of property, our judges of oyer and terminer, of the supreme courts, of the courts of appeal, or chancery, will all exercise their several judicial powers, exclusive and independent of the controul or interference of the foederal government.<sup>66</sup>

By organizing Coxe’s text and rendering it into modern language, we arrive at the following list of powers reserved to the states by the Constitution:

- With minor exceptions, ordinary criminal law is an exclusive state responsibility. Reserved to the states is jurisdiction over “disorders, riots, assaults, larcenies, bigamy, arson, burglaries, murders, state treason, and many other offences against [the states’] peace and dignity, which, being in no way subjected to the jurisdiction of the foederal legislature.” Only the states may “declare . . . the pains and penalties that shall be consequent on conviction.”
- The states control civil justice within state boundaries.
- Infrastructure is almost exclusively a state function: “general [i.e., non-post]<sup>67</sup> roads, canals, bridges, clearing rivers, erecting ferries.”
- Education and religion are exclusive state responsibilities. Only states may establish “state and county schools” and “places of worship,” or “incorporate societies for purposes of religion, learning, policy or profit.”
- The states enjoy exclusive jurisdiction over their internal commerce and other businesses since only they may “erect[] market houses” issue licenses, and inspect exports.
- Social services and health care are reserved exclusively to the states, for only states may establish “poor houses” and “hospitals.”
- The states retain exclusive power over inheritance and over land within their own boundaries.

All of these functions—as well as other items Coxe listed elsewhere—would be exercised by the states “independent of the controul or interference of the foederal government.” This

<sup>66</sup> 33 DOCUMENTARY HISTORY, *supra* note 5, at 912-13.

<sup>67</sup> Post roads were intercity, limited access highways punctuated by stations called “stages” or “posts.” Interstate highways are their modern analogues. See Robert G. Natelson, *Founding-Era Socialism: The Original Meaning of the Constitution’s Postal Clause*, 7 BRIT. J. AM. LEGAL STUDIES 1 (2018).

enumeration is entirely consistent with all others issued by the Federalists.<sup>68</sup> How these representations—widely distributed and unquestionably relied on—can be reconciled with plenary interpretations of federal enumerated powers is impossible to say.

<sup>68</sup> For example, the following enumeration appears in *The Freeman I*, PA. GAZETTE, Jan. 23, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 5, at 453, 457-58:

1st. Congress, under all the powers of the proposed constitution, can neither train the militia, nor appoint the officers thereof.

2dly. They cannot fix the qualifications of electors of representatives, or of the electors of the electors of the President or Vice-President.

3dly. In case of a vacancy in the senate or the house of representatives, they cannot issue a writ for a new election, nor take any of the measures necessary to obtain one.

4thly. They cannot appoint a judge, constitute a court, or in any other way interfere in determining offences against the criminal law of the states, nor can they in any way interfere in the determinations of civil causes between citizens of the same state, which will be innumerable and highly important.

5thly. They cannot elect a President, a Vice-President, a Senator, or a foederal representative, without all of which their own government must remain suspended, and universal Anarchy must ensue.

6thly. They cannot determine the place of chusing senators, because that would be derogatory to the sovereignty of the state legislatures, who are to elect them.

7thly. They cannot enact laws for the inspection of the produce of the country, a matter of the utmost importance to the commerce of the several states, and the honor of the whole.

8thly. They cannot appoint or commission any state officer, legislative, executive or judicial.

9thly. They cannot interfere with the opening of rivers and canals; the making or regulation of roads, except post roads; building bridges; erecting ferries; establishment of state seminaries of learning; libraries; literary, religious, trading or manufacturing societies; erecting or regulating the police of cities, towns or boroughs; creating new state offices; building light houses, public wharves, county gaols, markets, or other public buildings; making sale of state lands, and other state property; receiving or appropriating the incomes of state buildings and property; executing the state laws; altering the criminal law; nor can they do any other matter or thing appertaining to the internal affairs of any state, whether legislative, executive or judicial, civil or ecclesiastical.

10thly. They cannot interfere with, alter or amend the constitution of any state, which, it is admitted, now is, and, from time to time, will be more or less necessary in most of them.

For other lists, see Natelson, *Founders*, *supra* note 1; Natelson, *Enumerated*, *supra* note 1.

